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In the Supreme Court of the United States

OCTOBER TERM, 1970

ALFRED MELVIN FELDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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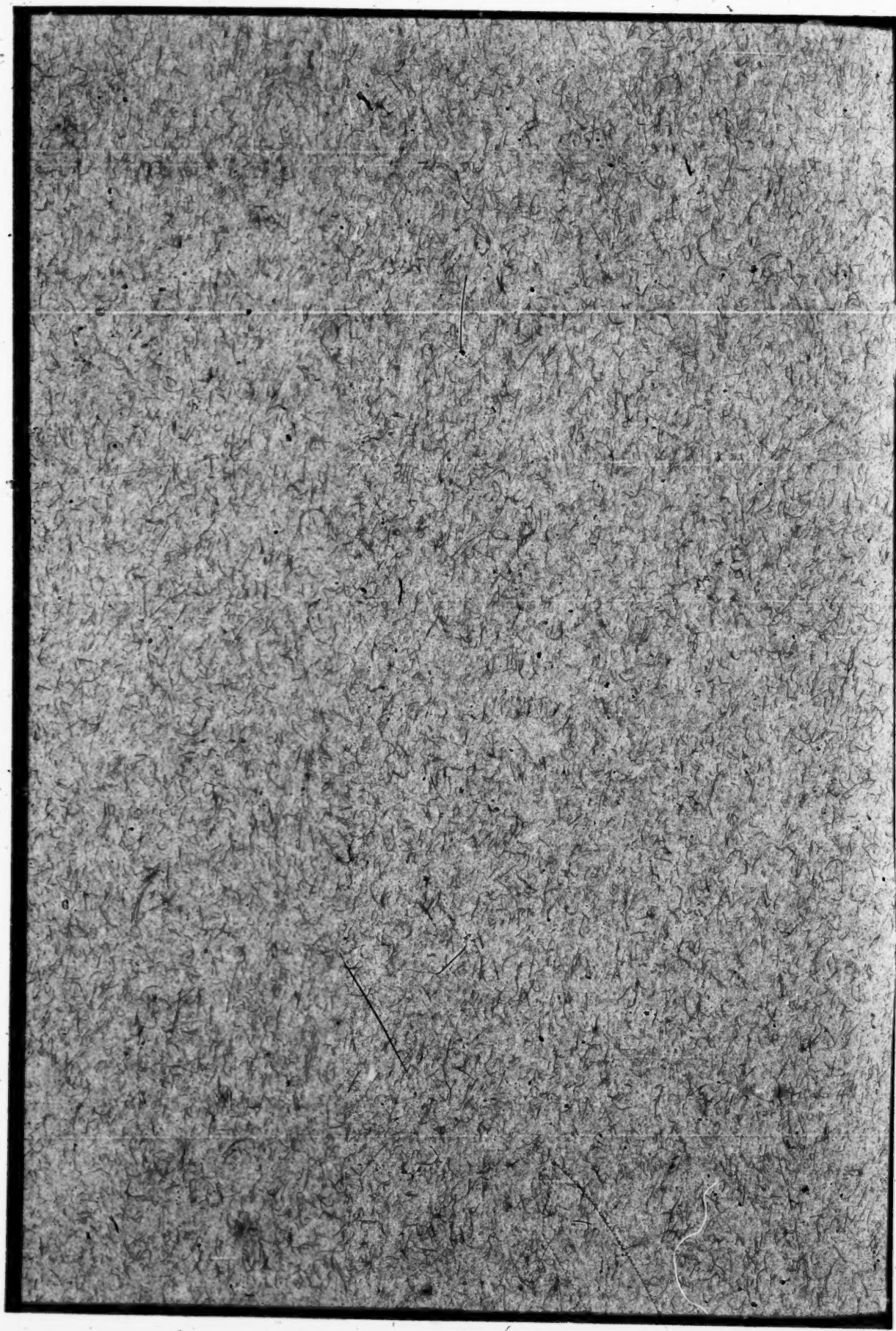

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 596

ALFRED MELVIN FELDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on three counts relating to marihuana. Count 1 charged petitioner and two others with aiding and abetting one Rosciano in smuggling marihuana into the United States from Mexico; count 2 charged the same individuals with aiding and abetting the concealment and transportation of the same marihuana; and count 3 charged conspiracy to import marihuana contrary to law. Petitioner was sen-

tenced to concurrent prison terms of ten years and to pay a fine of $20,000. The court of appeals affirmed, one judge dissenting (Pet. App. A).

The evidence is set forth in the opinion below. It showed that Rosciano was arrested at the Mexican-American border with approximately 130 pounds of marihuana concealed in a car that petitioner had provided. Other government evidence, disputed by petitioner, showed that he participated in a conspiracy with Rosciano and two others to import the marihuana and that he aided and abetted Rosciano to do so.

Although the government's evidence, if believed, showed actual knowledge by petitioner of the source of the marihuana, the trial judge, with the government's assent, charged the jury with respect to the statutory inference of knowledge of importation arising from possession of marihuana; the judge also instructed the jury about constructive possession. The court of appeals (one judge dissenting), noting that the jury could not have found possession if it did not believe the testimony showing that petitioner supplied the money and car for the purpose of carrying out the plan, found the presumption instruction harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18, and *Harrington* v. *California*, 395 U.S. 250.

1. Petitioner contends the court acted inconsistently with *Chapman* and *Harrington* by construing the evidence most favorably to the government. The challenged instruction allowed the jury to presume knowing importation from possession. Because possession

(which served as the basis for this presumption) was thus a prerequisite to guilt, the jury obviously had to resolve the evidentiary disputes in favor of the government in order to convict at all. Since the instructions with respect to possession were not (and are not) disputed, the court's approach was not inconsistent with *Chapman* or *Harrington*.[1] Those decisions do not require the government to prove again its entire case beyond a reasonable doubt. Instead what has to be shown is that the error was harmless beyond a reasonable doubt. In deciding whether the government sustained that burden here, the court of appeals properly viewed the evidence, which was not infected by the alleged error, as the jury must have viewed it and correctly concluded that the giving of the instruction was harmless error: the charge merely allowed the jury to presume something that needed no presuming.

2. Petitioner also contends that an erroneous instruction under *Leary* v. *United States*, 395 U.S. 6, can never be deemed harmless error.[2] There is no logical basis for this assertion. Where, as here, the government's evidence clearly showed actual knowledge of the Mexican source of the marihuana, a court may properly conclude that the giving of an instruction, which obviated the need to find such actual knowledge, was harmless beyond a reasonable doubt in light of the jury's verdict. We have argued to

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[1] The dissenting judge did not argue otherwise (Pet. App. 8-9).

[2] *Leary* was decided while the present case was pending on appeal.

similar effect in several pending cases in which courts of appeals have reached the identical conclusion. *E.g.*, *Garcia* v. *United States*, No. 293, this Term; *Vansant* v. *United States*, No. 5182; see, also, *Matalon* v. *United States*, No. 5298. Certiorari was denied in each of these cases on October 12, 1970.

In addition it is our position that *Leary* held only that the knowledge aspect of the presumption in 21 U.S.C. 176a was irrational with regard to the purchaser or ultimate consumer of marihuana. The Court's conclusion does not necessarily carry over to a large-scale supplier of marihuana, which petitioner obviously was. Such a dealer may reasonably be expected to know the source of his marihuana. See the government's briefs in opposition in *Matthews* v. *United States*, No. 375 Misc., O. T., 1969, and *Cook* v. *United States*, No. 531 Misc., O. T., 1969, certiorari jointly denied, 398 U.S. 968.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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ALFRED MELVIN FELDSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit.

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

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vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit.

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on November 16, 1970, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I

Conflict In The Decisions Of The Fifth And Ninth Circuit Courts Of Appeals Has Developed Since The Denial Of Certiorari.

In the instant case, the Ninth Circuit Court of Appeals ruled that the giving of an instruction under the presumption invalidated in *Leary v. United States*, 395 U.S. 6 (1969), constituted harmless error beyond a reasonable doubt. This decision rested on the Court of Appeals' belief that the sole basis for the jury's finding of conviction was a finding of constructive possession of marihuana due to belief of the government's evidence of control.

Directly conflicting with this ruling is the recent decision of the Fifth Circuit on June 15, 1970 in *United States v. Mathews*, 427 F.2d 922 (5th Cir. 1970). *Mathews* involved powerful direct evidence of unlawful importation of marihuana by the appellant—that he traveled on a plane entering the United States with marihuana in his baggage. A similar instruction under the invalid presumption was given. Despite the direct evidence of importation, the Fifth Circuit held that giving of the instruction was not harmless error beyond a reasonable doubt. Conviction under 21 U.S.C.A. § 176a was reversed.

This ruling directly contradicts the Ninth Circuit's view of what constitutes harmless error beyond a reasonable doubt. Since the government's evidence in *Mathews* showed that appellant himself initiated the process of importation at a point outside the United States, it is inconceivable that the jury could find possession, whether actual or constructive, without also finding knowledge of illegal importation. Therefore, the Fifth Circuit's holding, in light of such evidence, must be taken as stopping just short of saying that an instruction under the unconstitutional presumption is *necessarily* other than harmless error.

Additional Fifth Circuit cases recently decided reinforce

this interpretation. *United States v. Rodriquez Reinosa*, 427 F.2d 150 (5th Cir. 1970), decided May 27, 1970, reversed and remanded a District Court conviction on two counts of knowingly transporting illegally imported marihuana in violation of 21 U.S.C.A. § 176a. An instruction under the invalid presumption of § 176a was given. In spite of the government's evidence that appellants themselves actually imported the drug, the Court of Appeals ruled that the instruction required reversal. No discussion of possible harmless effect of this instruction was deemed necessary.

A conviction before a judge of knowingly transporting and facilitating the transportation and concealment of unlawfully imported marihuana was reversed by the Fifth Circuit because of reliance on the invalid presumption in a case decided June 10, 1970. *Medina v. United States*, 427 F.2d 525 (5th Cir. 1970). The court recognized that no evidence of knowledge of the origin of the marihuana had been provided.

The Fifth Circuit thus requires reversal in the absence of complete certainty that an unconstitutional presumption did not contribute in any manner, no matter how slight, to conviction. Its view of the presumption of knowledge of unlawful importation as harmless error is far narrower than that of the Ninth Circuit. The sole Fifth Circuit case of recent origin to rule the presumption harmless error beyond a reasonable doubt was *United States v. Pruneda*, 425 F.2d 1289 (5th Cir. 1970), decided May 5, 1970. Affirming a conviction under 21 U.S.C.A. § 176a, the appellate court found that appellant remained in Mexico during the time of the charged offenses and was not shown to have